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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 BARBARA A. HAASE,

8 Plaintiff,

9 v.

10 NANCY A. BERRYHILL, Acting
11 Commissioner of Social Security,

12 Defendant.

CASE NO. C17-5194-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

13 Plaintiff Barbara A. Haase proceeds through counsel in her appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits
16 (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's
17 decision, the administrative record (AR), and all memoranda of record, this matter is AFFIRMED.

18 **FACTS AND PROCEDURAL HISTORY**

19 Plaintiff was born on XXXX, 1962.¹ She has a ninth-grade education, and has worked as
20 a hotel housekeeper, medication technician, cannery worker, and animal caretaker. (AR 66, 75.)

21 Plaintiff protectively applied for SSI and DIB in June 2013. (AR 181-93, 220.) Those
22 applications were denied and Plaintiff timely requested a hearing. (AR 125-28, 131-44.)

23 ¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 On October 29, 2014, ALJ Kelly Wilson held a hearing, taking testimony from Plaintiff
2 and a vocational expert (VE). (AR 44-78.) On June 25, 2015, the ALJ issued a decision finding
3 Plaintiff not disabled. (AR 28-38.) Plaintiff timely appealed. The Appeals Council denied
4 Plaintiff's request for review on October 14, 2016 (AR 6-11), making the ALJ's decision the final
5 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this
6 Court.

7 **JURISDICTION**

8 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

9 **DISCUSSION**

10 The Commissioner follows a five-step sequential evaluation process for determining
11 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
12 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
13 engaged in substantial gainful activity since December 15, 2011, the alleged onset date. (AR 30.)
14 At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
15 found severe Plaintiff's degenerative disc disease of the lumbar spine. (AR 30-31.) Step three
16 asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that
17 Plaintiff's impairment did not meet or equal the criteria of a listed impairment. (AR 31.)

18 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
19 residual functional capacity (RFC) and determine at step four whether the claimant has
20 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
21 performing light work as defined in 20 C.F.R. §§ 404.1567(b), 416.967(b), with additional
22 limitations. She can stand/walk for four hours in an eight-hour workday. She can frequently kneel,
23 crouch, and crawl, and occasionally balance, stoop, and climb ramps and stairs. She cannot climb

1 ladders, ropes, or scaffolds. She must avoid concentrated exposure to vibration and hazards. (AR
2 31.) With that assessment, the ALJ found Plaintiff unable to perform any past relevant work. (AR
3 36.)

4 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
5 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
6 adjustment to work that exists in significant levels in the national economy. With the assistance
7 of the VE, the ALJ found Plaintiff capable of transitioning to the representative occupations of
8 small products assembler, office helper, and mail clerk.

9 This Court's review of the ALJ's decision is limited to whether the decision is in
10 accordance with the law and the findings supported by substantial evidence in the record as a
11 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
12 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
13 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
14 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
15 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
16 2002).

17 Plaintiff argues the ALJ erred in (1) discounting her subjective testimony; (2) assessing
18 medical opinions; and (3) failing to provide the VE with the questions she submitted in response
19 to the ALJ's vocational interrogatory.² The Commissioner argues that the ALJ's decision is
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21 ² Plaintiff's opening brief lists a challenge to the ALJ's assessment of lay evidence on the first page
22 (Dkt. 12 at 1), but there is no discussion of this issue anywhere else in the brief. As noted by the
23 Commissioner, there is also no lay evidence in the record, beyond the "other" source opinions challenged
in the section addressing the medical evidence. Plaintiff did not revisit this issue in the reply brief. Dkt.
14.

1 supported by substantial evidence and should be affirmed.

2 Plaintiff's subjective testimony

3 The ALJ summarized Plaintiff's subjective testimony and explained that she discounted it
4 because (1) the medical evidence does not corroborate Plaintiff's allegations of disabling
5 limitations; (2) Plaintiff received minimal and conservative treatment for her allegedly disabling
6 condition; (3) Plaintiff has not complied with all treatment recommendations; (4) Plaintiff's
7 activities demonstrate that she can perform light work; (5) Plaintiff stopped working for reasons
8 unrelated to her impairments; and (6) Plaintiff reported symptoms at the hearing that she had not
9 reported to providers, and specifically denied during a consultative examination. (AR 33-35.)
10 Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth Circuit.
11 *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). The Court will address each of the
12 ALJ's reasons in turn.

13 A. Medical evidence

14 Plaintiff challenges the ALJ's findings regarding the medical evidence on the grounds that
15 the ALJ cited only normal objective findings, but overlooked abnormal findings. Dkt. 12 at 9.
16 Plaintiff is mistaken. The ALJ's decision does refer to abnormal objective findings, but finds that
17 they were "fairly benign" and therefore inconsistent with allegations of disabling limitations. (AR
18 34 (referencing some limitations in range of motion (AR 307).) Plaintiff emphasizes abnormal
19 findings included in her one physical therapy note of record (AR 369-73), but subsequent treatment
20 records discussed by the ALJ demonstrate mostly normal findings. (AR 32-33.) Plaintiff has not
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22 The opening brief also challenges the ALJ's RFC assessment and step-five findings, but in doing
23 so only reiterates arguments made elsewhere. Dkt. 12 at 15-16. Accordingly, these issues will not be
analyzed separately.

1 shown that the ALJ cherry-picked evidence in an effort to portray her as less limited. The ALJ did
2 not err in considering the extent to which the medical evidence supported Plaintiff's allegations.
3 *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony
4 cannot be rejected on the sole ground that it is not fully corroborated by objective medical
5 evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's
6 pain and its disabling effects.").

7 B. Minimal, conservative treatment

8 Plaintiff argues that the ALJ erred in finding that her minimal treatment undermined her
9 subjective testimony, because the reason she had such limited treatment was due to her inability
10 to afford it, and it is not clear that she understood how to apply for insurance under the Affordable
11 Care Act (ACA) or how to obtain treatment at free or low-cost clinics. Dkt. 12 at 9-11. Plaintiff
12 cites no evidence in the record that she did not understand how to obtain ACA insurance or
13 treatment; an attorney's argument in a brief is not evidence. The ALJ asked Plaintiff about whether
14 she had tried to apply for ACA insurance at the hearing or visited any free clinics, and Plaintiff did
15 not testify that she did not understand how to do this; instead, she explained that she had insurance
16 through a state program. (AR 55-56.) The ALJ reasonably inferred that Plaintiff's failure to pursue
17 more comprehensive insurance or treatment undermined her allegations of disabling limitations.
18 *See Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints
19 where petitioner's "claim that she experienced pain approaching the highest level imaginable was
20 inconsistent with the 'minimal, conservative treatment' that she received").

21 Plaintiff also questions whether her treatment was actually conservative, as found by the
22 ALJ. She notes that she received one injection. Dkt. 12 at 10. The ALJ noted this injection (AR
23 33-34), however, and it is not unreasonable to characterize this limited treatment as "conservative."

1 Plaintiff also contends that the ALJ inaccurately stated that she did not use prescription
2 medication (AR 34), when in fact she used Flexeril. Dkt. 12 at 10. But Plaintiff testified that she
3 used Flexeril for muscle spasms, and that she takes that medication sparingly (AR 59-61); the ALJ
4 discussed the lack of prescription medication when addressing Plaintiff's pain. (AR 34.)
5 Plaintiff's treatment notes indicate that she relied on over-the-counter medications to manage her
6 pain. (*See, e.g.*, AR 305, 328, 369.) The ALJ reasonably interpreted the evidence related to
7 Plaintiff's use of medication, to find that her treatment was minimal or conservative in that regard,
8 and properly discounted Plaintiff's testimony on this basis.

9 C. Failure to comply with treatment

10 The ALJ noted that Plaintiff failed to follow through with treatment recommendations to
11 continue with physical therapy. (AR 34.) Plaintiff argues that she discontinued physical therapy
12 because it caused her pain (Dkt. 12 at 11), but her providers nonetheless suggested that she
13 continue with it. (*See* AR 341-42.) The ALJ did not err in considering Plaintiff's compliance with
14 treatment recommendations, when assessing her subjective testimony. *See Tommasetti v. Astrue*,
15 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that the ALJ permissibly inferred that the claimant's
16 pain was not as disabling as alleged "in light of the fact that he did not seek an aggressive treatment
17 program and did not seek an alternative or more-tailored treatment program after he stopped taking
18 an effective medication due to mild side effects").

19 D. Work history

20 The ALJ found that Plaintiff stopped working because she needed to take care of ailing
21 family members, which suggests that her unemployment is caused by reasons other than her
22 impairments. (AR 35.) Plaintiff argues that her caretaking duties do not demonstrate an ability to
23 perform full-time work (Dkt. 12 at 12), but Plaintiff misses the ALJ's point. The ALJ emphasized

1 that Plaintiff stopped working for reasons other than her impairments, which contradicts an
2 underlying premise of the disability program. *See* Social Security Ruling (SSR) 82-61, 1982 WL
3 31387, at *1 (Jan. 1, 1982) (“A basic program principle is that a claimant’s impairment must be
4 the primary reason for his or her inability to engage in substantial gainful work.”). This rationale
5 is a clear and convincing reason to discount Plaintiff’s subjective testimony.

6 E. Inconsistent symptom reporting

7 The ALJ noted that Plaintiff testified about some urinary symptoms at the hearing, but had
8 never reported them to her providers and specifically denied urinary issues at her consultative
9 examination two months after the hearing. (*See* AR 48, 347.)

10 Plaintiff argues that the ALJ should not have relied on this discrepancy in the record,
11 because the ALJ did not ask Plaintiff why she failed to report urinary symptoms to the consultative
12 examiner. Dkt. 12 at 12. But the consultative examination occurred after the hearing, so the ALJ
13 could not have asked Plaintiff about it at the hearing.

14 The ALJ did not err in considering the extent to which Plaintiff consistently reported
15 symptoms to her providers, when assessing her subjective symptom testimony. *See Greger v.*
16 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ may consider a claimant’s inconsistent or non-
17 existent reporting of symptoms).

18 F. Daily activities

19 The ALJ found that Plaintiff’s activities demonstrate that she can perform light work, but
20 did not point out any inconsistencies between her activities and her allegations, or make findings
21 regarding the transferable work skills demonstrated by her activities. (AR 34-35.) The ALJ
22 therefore erred in relying on Plaintiff’s activities in discounting her subjective testimony. *See Orn*
23 *v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may undermine credibility where they (1)

1 contradict the claimant's testimony or (2) "meet the threshold for transferable work skills").

2 This error is harmless, however, in light of the ALJ's many other clear and convincing
3 reasons to discount Plaintiff's subjective testimony. *See Carmickle v. Comm'r of Social Sec.*
4 *Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

5 Medical opinion evidence

6 Plaintiff contends that the ALJ erred in assessing the medical evidence in various ways.

7 In general, more weight should be given to the opinion of a treating physician than to a
8 non-treating physician, and more weight to the opinion of an examining physician than to a non-
9 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
10 by another physician, a treating or examining physician's opinion may be rejected only for "clear
11 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
12 Where contradicted, a treating or examining physician's opinion may not be rejected without
13 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
14 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ may reject
15 physicians' opinions "by setting out a detailed and thorough summary of the facts and conflicting
16 clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157
17 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating
18 her conclusions, the ALJ "must set forth [her] own interpretations and explain why they, rather
19 than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

20 The Court will address each disputed opinion in turn.

21 A. Rashpal Raj, PA-C

22 Mr. Raj examined Plaintiff for a DSHS benefits review in August 2013, and summarized
23 her functional limitations, which he expected to last for six months. (AR 303-07.) He opined that

1 Plaintiff could lift/carry 20 pounds occasionally, and 10 pounds frequently. (AR 303.) He stated
2 that Plaintiff could stand for two hours out of an eight-hour workday. (*Id.*)

3 The ALJ summarized Mr. Raj's opinion and explained that she gave little weight to it
4 because Mr. Raj had no treatment relationship with Plaintiff at the time of the opinion and was not
5 an acceptable medical source. (AR 35-36.) The ALJ also noted that Mr. Raj's opinion was of
6 limited duration, and was inconsistent with the normal objective findings he noted on examination.
7 (AR 36.)

8 Most of these reasons are legitimate. The depth of a source's relationship with a claimant
9 is an appropriate factor to consider when weighing that source's opinion. *See* 20 C.F.R. §§
10 404.1527(c)(2), 416.927(c)(2). The duration of the opinion is also relevant, in light of the
11 durational component to the definition of disability. *See* 42 U.S.C. § 423 (d)(1)(A) (disability
12 means "inability to engage in any substantial gainful activity by reason of any medically
13 determinable physical or mental impairment . . . which has lasted or can be expected to last for a
14 continuous period of not less than 12 months"). Mr. Raj's status as a non-acceptable medical
15 source is also a relevant factor, particularly because another examination was performed by a
16 medical doctor, and the ALJ explained that his opinion was more persuasive. (AR 36.) The ALJ
17 did not cite any medical findings actually inconsistent with any of Mr. Raj's conclusions, but this
18 error is harmless in light of the other valid reasons to discount Mr. Raj's opinion.

19 B. Derek Leinenbach, M.D.

20 Dr. Leinenbach examined Plaintiff in January 2015, and concluded that *inter alia* she could
21 stand/walk for 1-2 hours at a time, totaling four hours out of an eight-hour workday. (AR 350.)
22 He opined that Plaintiff could sit for 1-2 hours at a time, totaling six hours out of an eight-hour
23 workday. (*Id.*) The ALJ gave significant weight to Dr. Leinenbach's opinion, finding it consistent

1 with the objective evidence, the minimal treatment record, and Plaintiff's activities. (AR 35.)

2 Plaintiff argues that Dr. Leinenbach's opinion is in fact inconsistent with the objective
3 evidence, but does not explain how. Dkt. 12 at 7. This bald assertion is insufficient to show that
4 the ALJ's interpretation is unreasonable.

5 Plaintiff also argues that Dr. Leinenbach's opinion does not account for all of her subjective
6 allegations (Dkt. 12 at 7), but the ALJ did not state that it did, and the ALJ properly discounted
7 Plaintiff's subjective allegations. Thus, Plaintiff has not shown error in the ALJ's decision by
8 contending that Dr. Leinenbach's opinion does not account for her subjective statements.

9 And in any event, an ALJ is not required to give reasons to give significant weight to an
10 opinion; the ALJ must explain why an opinion is *rejected*. See SSR 96-8p, 1996 WL 374184, at
11 *7 (Jul. 2, 1996) ("If the RFC assessment conflicts with an opinion from a medical source, the
12 adjudicator must explain why the opinion was not adopted."). Thus, Plaintiff's arguments
13 challenging the ALJ's reasons to credit Dr. Leinenbach's opinion do not show error in the ALJ's
14 decision. Dkt. 12 at 7-8.

15 C. State agency opinions

16 Plaintiff argues that the ALJ erred in giving significant weight to a State agency medical
17 consultant's opinion regarding her limitations, because his opinion was rendered in 2013 and is
18 not entirely consistent with the remainder of the record. Dkt. 12 at 8.

19 Plaintiff's arguments are not persuasive. The ALJ explained that she gave more weight to
20 Dr. Leinenbach's opinion than the State agency opinion, because Dr. Leinenbach's opinion was
21 rendered in 2015, "contemporaneous to the hearing." (AR 35.) Furthermore, Mr. Raj's contrary
22 opinion cited by Plaintiff was properly discounted by the ALJ, as explained *supra*. Plaintiff has
23 not established error in the ALJ's assessment of the State agency opinion.

1 D. Miscellaneous evidence

2 Plaintiff argues that the ALJ erred in failing to acknowledge various pieces of evidence.
3 Dkt. 12 at 5-6. The ALJ need not discuss every piece of evidence, however, but must explicitly
4 explain only why significant, probative evidence is rejected. *Vincent v. Heckler*, 739 F.2d 1393,
5 1394-95 (9th Cir. 1984). The ALJ's decision contains a thorough summary of the medical
6 evidence. That the ALJ did not interpret the findings in the same way that Plaintiff does is not
7 evidence of error, because Plaintiff has not shown that the ALJ's interpretation of the evidence is
8 unreasonable. *See Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("Where evidence is
9 susceptible of more than one rational interpretation, it is the ALJ's conclusion which must be
10 upheld. In reaching his findings, the law judge is entitled to draw inferences logically flowing
11 from the evidence.").

12 VE interrogatory

13 The ALJ submitted an interrogatory to the VE after the hearing, and notified Plaintiff of
14 the VE's responses. (*See* 275-81.) Plaintiff submitted a *pro se* response to the VE's response, and
15 asked that her response be given to the VE. (AR 284-86.) Plaintiff's response suggests various
16 additions to the RFC/VE hypothetical, based on her symptoms. (*Id.*) Plaintiff argues that the ALJ
17 violated her duty to fully develop the record by not giving her response to the VE. Dkt. 12 at 16.

18 The ALJ explained in her decision that she found Plaintiff's VE response to be
19 "misdirected," because the VE was not responsible for determining her RFC. (AR 38.) The ALJ
20 is tasked with this responsibility, and she properly explained why she discounted Plaintiff's
21 symptom testimony. SSR 96-5p, 1996 WL 374183 (Jul. 2, 1996). Plaintiff has cited no authority
22 requiring an ALJ to submit her responses to the VE, and the Court is aware of none. Instead,
23 agency guidance makes clear that the ALJ determines whether a claimant's questions to a VE are

1 appropriate. *See* Hearings, Appeals and Litigation Law Manual I-2-6-74 (C). Accordingly,
2 Plaintiff has not shown that the ALJ failed to develop the record.

3 **CONCLUSION**

4 For the reasons set forth above, this matter is AFFIRMED.

5 DATED this 2nd day of November, 2017.

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8 Mary Alice Theiler
9 United States Magistrate Judge
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